Burke, Michael

SANCTIONS

Frivolous defense

Because a series of Board significant decisions place the Department on notice of the likely outcome in a similar fact pattern, and the Department has not sought review when it had the opportunity, it is frivolous for the Department to proceed in the defense of its order when there is no debatable issue based on the Board's significant decisions. **….*In re Michael Burke*, BIIA Dec., 99 14179 (2001)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL G. BURKE	)	**DOCKET NOS. 99 14178 & 99 14179**
	)	
	)	**ORDER GRANTING MOTION FOR**
CLAIM NO. P-396379	)	**SANCTIONS**

The claimant, Michael G. Burke, filed an appeal with the Board of Industrial Insurance Appeals on April 15, 1999, from an order of the Department of Labor and Industries dated April 2, 1999. The order affirmed the provisions of several orders dated August 27, 1998, October 9, 14, 15, and 16, 1998. The August 27, 1998 order denied loss of earning power benefits for the period December 27, 1997 through August 25, 1998 on the basis the claimant's condition was fixed and stable. The October 9, 1998 order assessed an overpayment of time-loss compensation benefits for the period March 13, 1996 through March 18, 1996. The October 14, 1998 order assessed an overpayment for the payment of time-loss compensation benefits for the period September 2, 1996 through October 11, 1996. The October 15, 1998 order paid loss of earning power benefits for the period September 2, 1996 through October 27, 1996, with a deduction for the assessed overpayment. The October 16, 1998 order assessed an overpayment for the payment of loss of earning power benefits for the period November 8, 1997 through December 8, 1997. We assigned the appeal Docket No. 99 14178.

Mr. Burke's appeal also involved an April 5, 1999 order. The order closed the claim with time-loss compensation as paid to November 7, 1997. We assigned the appeal Docket No. 99 14179.

On May 1, 2000, we entered an Order Adopting Proposed Decision and Order regarding these appeals. On May 17, 2000, Mr. Burke submitted a motion for attorney fees, seeking relief under RCW 4.84.185. To the extent the motion was raised under RCW 4.84.185, we will address it. *See In re Don Eerkes*, BIIA Dec., 90 2531 (1992). After consideration of the motion, the response of the Department, and the claimant's reply, we determine that there are sufficient grounds upon which to grant the motion for attorney fees and the motion will be granted.

The facts involved with these appeals were stipulated to by the parties and are well described in the Proposed Decision and Order. The Proposed Decision and Order, issued on March 17, 2000, reversed the Department's orders to the extent the orders failed to pay the claimant loss of earning power benefits for the period November 8, 1997 through April 5, 1999. Neither the Department nor the claimant petitions for review of the Proposed Decision and Order issued on March 17, 2000. Accordingly, we entered the Order Adopting Proposed Decision and Order.

As noted in the Proposed Decision and Order, the only issue involved whether the claimant was entitled to loss of earning power benefits for a period the Department determined that his medical conditions were fixed and stable. The Department did not address the legal fixity of the claim until April 5, 1999, the date the claim was closed.

This Board has consistently determined that a worker receiving loss of earning power compensation, whose condition becomes fixed but whose earning power is not fully restored, is entitled to continuation of loss of earning power compensation until an order is entered fixing the extent of permanent partial disability. *In re Charles Deering*, BIIA Dec., 25,904 (1968), *citing Hunter v. Department of Labor & Indus.*, 43 Wn.2d 696 (1953). Similarly, we have held that an order that

indicates the claimant's condition is medically fixed but that does not determine the extent of permanent disability, if any, "does not justify the termination of loss of earning power benefits otherwise payable." *In re Carl Coolidge*, BIIA DEC., 98 4308 (1991) at 4.

We have noted the distinction between legal and medical fixity for a considerable period and have designated as "significant" the decisions describing the distinction. RCW 51.52.160 requires us to publish and index significant decisions. The purpose of the publication is to provide a guide for those who appear in front of the agency as to how we would respond to various issues and facts, as well as providing guidance to our industrial appeals judges.

In this instance, the parties clearly understood the import of the stipulated facts and the likely outcome. In fact, the Department elected not to petition for review of the Proposed Decision and Order. As noted in the claimant's motion for attorney fees, the Department's only defense "was its assertion that loss of earning power benefits are not payable past the date that a claimant's medical conditions become fixed and stable." Claimant's Motion at 3.

In response to the motion, the Department asserts that the Department's defense in this case was "neither meritless or frivolous." Department's Response at 2. As support for its position, the Department refers to its internal policy, argues that the issue is debatable and that Board decision are not precedential.

We reject the Department's position for several reasons. First, the policy described by the Department is internal to that agency and does not bind either the parties appearing before it or this agency that review determinations made pursuant to that policy. The Department argues that because an appellate decision is pending regarding the subject of this policy's validity, the topic is open for discussion. The Department's choice not to seek further review in this case demonstrates the flaw of that assertion.

The claimant requested attorney fees, essentially sanctions, under RCW 4.84.185, often referred to as the frivolous claims statute. This statute was enacted to discourage abuse of the legal system by providing for award of expenses and legal fees to any party which might be forced to defend itself against claims that are asserted without merit and that are asserted for purposes of harassment, delay, nuisance or spine. *Suarez v. Newquist*, 70 Wash. App. 827 (1993). A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts. Sanctions have been found to be appropriate if a complaint lacks a factual or legal basis and the persons signing the complaint fail to conduct a reasonable inquiry into the factual and legal basis of the claim. *Harrington v. Pailthorp*, 67 Wash. App. 901 (1992), *review denied*, 121 Wn.2d 1018 (1993). It has also been said that a lawsuit may be frivolous when there is no debatable issue over which reasonable minds could differ an there is so little merit that the chance of reversal is slim. *Kearney v. Kearney*, 95 Wash. App. 405 (1999).

Although the Department's representative asserts that the is a debatable issue with regard to the distinction between legal and medical fixity and its implications regarding loss of earning power benefits, nothing in the response to the motion supports the assertion. Although the policy issue is pending before the Court of Appeals, in an appeal from our ruling in *In re Ralph Faulder*, Dckt. No. 96 3353 (February 5, 1998)[1], no review was sought in this case regarding this particular fact pattern.

[1] In fact, it appears that the appellate case has been dismissed.

The purpose of our significant decisions is to place the parties on notice of the likely outcome of a later appeal in a similar fact pattern. We have designated, as significant, a series of decisions describing our standards regarding loss of earning power benefits. The Department clearly knew the likely outcome of this appeal, and despite that, defended its order. Requiring a party to pursue an appeal and present a case when the outcome is clear meets the standards of RCW 4.84.185.

If the Department's position were defensible, the Assistant Attorney General could have, and should have, sought further review. Opting to allow the Proposed Decision and Order to be adopted as the final order without seeking review supports the conclusion that the defense of the appealed order could not be supported by any rational argument on the law or facts. RCW 51.52.102 permits the Department, "whenever the board has made any decision and order reversing an order of the supervisor of industrial insurance on questions of law or mandatory administrative actions of the director: to appeal to the superior court. Had there been a debatable issue of law, the Department could have sought review before us and before the superior court. The Department elected not to do so, however.

It is apparent to us that there were no debatable issues with regard to the issue of fixity and the appropriateness of loss of earning power benefits in this appeal. It was frivolous for the Department to proceed on the defense of its orders regarding Mr. Burke's claims. Because we are convinced that the Department's position was unsupported by facts and law, we determine that the Motion for Attorney Fees under RCW 4.84.185 must be granted.

Claimant's counsel stated that he spend two and one-half hours responding to the Department's defense. That time omits the time spend developing the stipulation of facts. According to counsel, the hourly charge is $150.00. We therefore determine that the Department shall pay the sum of $375.00 to Michael G. Burke as and for attorney fees incurred by Small, Snell, Weiss & Comfort, P.S., related to the pursuit of this appeal.

It is so ORDERED.

DATED: July 25, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
FRANK E. FENNERTY, JR. Member